

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-498

EDWARD R. FITZGERALD

vs.

MAUREEN F. FOLEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The decedent's daughter appeals the striking of her objections to the purported last will of her mother. The Massachusetts Uniform Probate Code states that an affidavit of objections must state "the specific facts and grounds upon which the objection is based." G. L. c. 190B, § 1-401(e), as amended by St. 2012, c. 140 § 66. In determining whether to allow a motion to strike an affidavit of objection the judge must examine only the materials submitted by the objector, and must apply a standard that "is somewhat more demanding than the highly indulgent one that applies to complaints." Brogan v. Brogan, 59 Mass. App. Ct. 398, 400 (2003).

The motion judge concluded that there were insufficient facts stated in the affidavit to show under the applicable standard that the petitioner, the objector's brother and the son

of the decedent, "in fact . . . used the[e] opportunity [to exercise undue influence] to procure the contested disposition through improper means." See O'Rourke v. Hunter, 446 Mass. 814, 828 (2006) ("Four considerations are usually present in a case of undue influence: that an (1) unnatural disposition has been made (2) by a person susceptible to undue influence to the advantage of someone (3) with an opportunity to exercise undue influence and (4) who in fact has used that opportunity to procure the contested disposition through improper means") (quotation omitted). Having read the affidavits of objection closely, and even assuming there were sufficient facts stated as to all other elements of undue influence, we agree.

That is not to say that the allegations might not have sufficed to support a request for additional discovery had one been properly made. In this case, the affidavit of objection was filed on October 17, 2013, the motion to strike was filed on January 23, 2014, and the hearing on that motion was originally scheduled for March 20, 2014. The parties jointly agreed to a continuance in order to allow for the completion of discovery. The motion for a continuance was allowed and the hearing was rescheduled for June 5, 2014.

The objector served a subpoena duces tecum on the office of the attorney who drafted the will on December 20, 2013, and requests for production of documents and interrogatories on the

petitioner around January 20, 2014. The petitioner produced documents in response to these requests starting in April, and, ultimately on May 19, 2014, delivered to the objector a banker's box of documents, which the objector describes as having been completely unorganized and containing 3,700 pages.

The objector did not, however, seek a continuance from the court for further discovery based on these documents. She did not notice any depositions, nor did she file a motion to compel.¹ See Baxter v. Grasso, 50 Mass. App. Ct. 692, 698 n.7 (2001) (holding that, inter alia, Mass.R.Civ.P. 33, 34, and 37 are applicable to will contests). Rather, she raised the issue of further discovery for the first time in her opposition to the motion to strike, filed June 4, 2014, and at the hearing on the motion to strike the next day, where she argued that if the affidavit were inadequate, the judge should treat the motion to strike as premature and allow further discovery. The judge's determination to rule on the merits and not to allow further

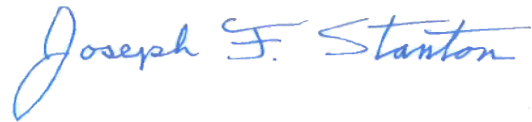
¹ The record on appeal does not indicate the timeframe in which the petitioner responded to the objector's interrogatories or requests for production, nor does it indicate whether the petitioner responded to the objector within thirty days after the requests were propounded to indicate whether each item or category of documents could be inspected as requested. See Mass.R.Civ.P. 34(b)(2)(A), as appearing in 466 Mass. 1407 (2013). In any case, no motion to compel was filed, either after thirty days to learn whether inspection would be permitted, or after the petitioner had failed to permit inspection as requested. See Mass.R.Civ.P. 37(a)(2), 365 Mass. 794 (1974).

discovery is reviewed for an abuse of discretion. Cf. Alphas Co. v. Kilduff, 72 Mass. App. Ct. 104, 110 (2008) (setting forth factors to be considered in abuse of discretion review of denial of motion for continuance under Mass.R.Civ.P. 56[f]). We conclude that at least where this request was raised for the first time the day before the hearing on the motion to strike, there was no abuse of discretion on the part of the motion judge in ruling on the affidavit without allowing further discovery. Not only was the request not made until the eve of the hearing on the motion to strike, the objector did not specify what discovery exactly she would seek, whom she proposed to depose, what the documents delivered to her revealed that warranted additional discovery, or even that she had been unable, given the slightly more than two weeks since the documents had been

delivered, to review them with adequate care to specify any of these things.²

Judgment affirmed.

By the Court (Trainor,
Rubin & Blake, JJ.³),



Clerk

Entered: June 24, 2016.

² To the extent that the judge relied on not only the bequest in the will of the Boston and Winthrop properties to the petitioner and Joseph Vaccaro, but on the subsequently granted deeds to those properties, we agree with the objector that the judge improperly looked beyond the four corners of the affidavit and the materials attached thereto. We think, however, that this error was harmless. The affidavit of objections is inadequate to survive a motion to strike even ignoring these deeds, which the judge weighed in the petitioner's favor.

³ The panelists are listed in order of seniority.